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Supreme Court, U.S.
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No. 04-____

IN THE
Supreme Court of the United States

JAMES LOCKHART,
Petitioner,

v.

UNITED STATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

BRIAN WOLFMAN
(*Counsel of Record*)
ADINA H. ROSENBAUM
PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, NW
WASHINGTON, D.C. 20009
(202) 588-1000

Counsel for Petitioner

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QUESTION PRESENTED

Do the Social Security Act and the Debt Collection Improvement Act bar the United States from withholding social security benefits to collect student loan debt that has been outstanding for more than ten years, as the Eighth Circuit has held, or does the Higher Education Act eliminate any such bar, as the Ninth Circuit held below?

LIST OF PARTIES

Petitioner:
James Lockhart

Respondents:
United States of America
Secretary of Education of the United States
Secretary of the Treasury of the United States
Attorney General of the United States

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PETITION FOR A WRIT OF CERTIORARI

In the decision below, the Ninth Circuit held that the federal government may seize a social security recipient's benefits to collect student loan debt that has been outstanding for more than ten years. The Eighth Circuit has reached exactly the opposite conclusion. *See Lee v. Paige*, 376 F.3d 1179 (8th Cir. 2004). James Lockhart, a disabled man who relies on his monthly social security check to pay for his food and prescription medication, respectfully petitions this Court to review the Ninth Circuit's decision and resolve this circuit split.

This Court should grant certiorari because, as the government recently asserted in its now denied petition for rehearing in the Eighth Circuit, the question presented is "of [e]xceptional [i]mportance." Pet. App. 20a. The decision below implicates two of the largest federal programs—social security and federal student aid—in a manner that affects the ability of some of the most impoverished Americans to meet their daily needs. Left unresolved, the circuit split "creates a situation in which the legality of social security offsets in the present context will depend on where the debtor lives, which is clearly an unacceptable state of affairs." Pet. App. 21a.

OPINIONS BELOW

The opinion of the court of appeals is reported at 376 F.3d 1027 and is reproduced in the appendix at 1a. The court of appeals' unreported order denying petitioner's petition for rehearing is reproduced in the appendix at 9a. The district court's unreported order dismissing the complaint is reproduced in the appendix at 8a.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2004. A timely petition for rehearing was denied on November 4, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The anti-alienation provision of the Social Security Act of 1935, 42 U.S.C. § 407, provides:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> (b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

In 1991, the Higher Education Assistance Act of 1965, 20 U.S.C. § 1091a(a), was amended, in relevant part, to read as follows:

> (2) Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by--
>
> . . . .
>
> (D) the Secretary [of Education], the Attorney General, the administrative head of another Federal agency . . . for the repayment of [a student loan] . . . that has been assigned to the Secretary . . . .

In 1996, Congress enacted the Debt Collection Improvement Act (DCIA), as an amendment to the Debt Collection Act of 1982. The DCIA made social security benefits subject to offset, but also retained a ten-year limitations period on the government's offset authority. The statute, codified at 31 U.S.C. §§ 3716, provides in relevant part as follows:

> (c)(3)(A)(i) Notwithstanding any other provision of law (including sections 207 and 1631(d)(1) of the Social Security Act (42 U.S.C. 407 and 1383(d)(1)) . . . except as provided in clause (ii), all payments due to an individual under . . . the Social Security Act . . . shall be subject to offset under this section.
>
> (ii) An amount of $9,000 which a debtor may receive under Federal benefit programs cited under clause (i) within a 12-month period shall be exempt from offset under this subsection.
>
> . . . .
>
> (e) This section does not apply--
>
> (1) to a claim under this subchapter that has been outstanding for more than 10 years; or
>
> (2) when a statute explicitly prohibits using administrative offset to collect the claim or type of claim involved.

STATEMENT

A. Statutory Framework

The question in this case is whether the government may seize social security benefits to collect student loan debt that has been outstanding for more than ten years. Answering that question requires the synthesis of four provisions enacted

at four different points in time and contained in three distinct statutory schemes: the Social Security Act, the Higher Education Act, and the Debt Collection Act (as amended by the Debt Collection Improvement Act). The chronology of these enactments is crucial to understanding how the Ninth Circuit erred below.

1. The Social Security Act of 1935

The Social Security Act of 1935, as amended, establishes a social insurance program for wage earners and their dependents, 42 U.S.C. § 401, *et seq.*, and a welfare program for people who are blind, aged, or disabled. 42 U.S.C. § 1381, *et seq*. These programs are designed principally "to provide a minimum level of security against the economic uncertainties of old age." H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935).

The benefits paid by these programs are protected by a very strict anti-alienation provision. The provision states that "none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a). As this Court has recognized, "[t]he language is all-inclusive." *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 415 (1973). "[I]t imposes a broad bar against the use of any legal process to reach all social security benefits." *Id.* at 417.

In 1983, Congress strengthened the already broad protection afforded by the anti-alienation provision in response to bankruptcy court decisions permitting the attachment of social security benefits by bankruptcy trustees based on the supposed repeal by implication of section 407 by the Bankruptcy Reform Act. *See* Pub. L. No. 98-21, § 335(a) (1983), *reprinted in* 1983 U.S.C.C.A.N. 443. Congress added to the anti-alienation provision an unusual requirement that

"[n]o other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section." 42 U.S.C. § 407(b).

2. The Debt Collection Act of 1982

Several statutes authorize federal agencies, including the Secretary of Education, to employ a number of means to collect debts owed to the United States. In addition to filing suit to obtain or collect a judgment, the Secretary of Education may collect student loan debts through extra-judicial means. For example, even if the government has not obtained a judgment, federal law allows agencies to collect a debt by directing the Department of the Treasury to intercept tax refunds, 31 U.S.C. § 3720A, or, where a debt is owed by a federal employee, by deducting part of the employee's salary, 5 U.S.C. § 5514. The Department of Education has also been given special authority to garnish the wages of private employees by issuing administrative garnishment orders. 20 U.S.C. § 1095a.

This case concerns a particular debt collection tool available to federal agencies. The Debt Collection Act of 1982 (DCA) authorized the federal government to collect debts by means of "administrative offset," 31 U.S.C. § 3716(a), which the Act defines as the "withholding of money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes to the government." 31 U.S.C. § 3701(a)(1); 31 C.F.R. § 285.4(c) (describing offset program); 63 Fed. Reg. 44,986-01 (Aug. 21, 1998) (same). The Treasury Department operates a centralized program, known as the Treasury Offset Program, that is used by federal agencies and states to collect debt by offsetting various payments, including tax refunds and federal salaries. Under this program, creditor agencies—such as the Department of Education—that

have been unable to collect claims against a debtor, certify nontax debts that are over 180 days delinquent to be collected by administrative offset. The officials disbursing payments on behalf of federal agencies then withhold funds to pay the claim.

The DCA, however, specifically exempted two categories of claims from administrative offset. The government's offset authority does not apply "to a claim under this subchapter that has been outstanding for more than 10 years" or "when a statute explicitly prohibits using administrative offset to collect the claim or type of claim involved." 31 U.S.C. § 3716(e) (originally codified at 31 U.S.C. § 3716(c)).

By virtue of the Social Security Act's anti-attachment provision, the government's administrative offset authority did not initially extend to social security benefits. As explained below, social security benefits did not become subject to offset until 1996, when the DCA was amended.

3. 1991 Amendment to the Higher Education Act of 1965

In 1991, Congress sought to ensure that obligations to repay federal student loans and grant overpayments generally would be enforceable without regard to state or federal limitations periods. It therefore amended the Higher Education Act of 1965 (HEA) to provide: "Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by" the Secretary of Education or another government agency "for the repayment of [a student loan] . . . that has been assigned to the Secretary." Higher Education Technical Amendments of 1991, Pub. L. No. 102-26, § 3, 105 Stat. 123, 124 (1991) (codified at 20 U.S.C. § 1091a(a)(2)).

The legislative history indicates that Congress was concerned primarily with the government's collection of student loan debt through the offset of *tax refunds*, as authorized by 31 U.S.C. § 3720A. The amendment was a direct response to *Grider v. Cavazos*, 911 F.2d 1158, 1164-65 (5th Cir. 1990) (holding that "an assigned student loan debt which is time barred for collection by lawsuit cannot be collected by tax refund offset" if the debt is over ten years old). *See* 137 Cong. Rec. H1808, H1810 (1991) (statement of Rep. Ford) (noting that the amendment "overcomes a recent circuit court decision that puts in jeopardy the ability of the Department of Education to collect defaulted student loans through offsets of income tax refunds and other means."); *id.* at H1812 (statement of Rep. Barrett) ("I'm proud to see that we are restoring the highly successful tax offset mechanism to collect on defaulted student loans.").

The 1991 HEA amendment neither mentioned social security benefits nor made express reference to the Social Security Act's anti-alienation provision. This is not surprising, because, at the time the amendment was enacted, the government did not have the authority to offset social security benefits under any circumstances.

4. The Debt Collection Improvement Act of 1996

In 1996, however, Congress enacted the Debt Collection Improvement Act (DCIA), which amended the Debt Collection Act by expanding the debt collection tools available to the government. Pub. L. No. 104-134, Title III, § 31001(a)(2), 110 Stat. 1321-358 (1996) (codified at 31 U.S.C. § 3716). The DCIA authorized the withholding of social security payments through administrative offset for the first time, making the required "express reference" to the social security anti-alienation provision. 31 U.S.C. § 3716(c).

However, Section 3716 also imposes a number of important safeguards and limitations. For example, the first $9,000 of social security or other payments are exempt from offset. *Id.* § 3716(c)(A)(ii). Furthermore, administrative offsets may only be imposed after the debtor has been given notice of the agency's claim and the opportunity to contest the debt in administrative review, or an opportunity to negotiate an agreement for repayment. *Id.* § 3716(a).

Perhaps most importantly—and crucially for this case—the DCIA retained the DCA's ten-year statute of limitations, which had previously been codified at 31 U.S.C. § 3716(c). The provision prohibits administrative offset of any claim "that has been outstanding for more than 10 years." 31 U.S.C. § 3716(e)(1).

The DCIA's legislative history shows that Congress was particularly concerned about the impact that administrative offset might have on social security beneficiaries and intended the government to strictly observe safeguards and limitations on its offset authority. "Such safeguards are critical," the Conference Report emphasized, "when benefits such as Social Security are the sole or major source of income for the debtor." H.R. Conf. Rep. No. 104-537, 104th Cong., 2d Sess., 142 Cong. Rec. H3842, H4042-43 (Apr. 25, 1996); *see also* 67 Fed. Reg. 78,940 (Dec. 26, 2002) (stating that "[l]imitations on [the offset of] types of Federal payments, such as Federal salary and social security payments apply.").

B. Factual Background

At the time he brought this lawsuit, petitioner James Lockhart survived on a fixed income consisting of $874.00 in monthly Social Security Disability (SSD) benefits and $10.00

in monthly food stamps. SER 17 at 23-24.[1] Following his sixty-fifth birthday in July 2003, Mr. Lockhart's period of disability ended and he began receiving old-age benefits. *See* 20 C.F.R. § 404.321(c)(1).

In addition to ordinary living expenses, Mr. Lockhart must also use his monthly benefits to pay for significant medical expenses. He underwent double bypass heart surgery in 1999 and requires six prescription medications for his lingering cardiovascular problems. SER 3 at 28. He also suffers from Type II diabetes, which requires him to purchase additional medical supplies. *Id.* Not surprisingly, he struggles to meet these expenses with his limited social security benefits. *Id.* 2 at 12.

Mr. Lockhart became unemployed in 1981, and his only subsequent employment lasted for a few months in 1987. *Id.* 2 at 6. He attended several institutions of higher education between 1984 and 1990, borrowing a series of federally-guaranteed educational loans. *Id.* 2 at 7. He was unable to repay the majority of these loans, and the earliest debt was assigned to the Department of Education in October 1991. *Id.* 1 at 44.

On February 6, 2002, a private collection agency notified Mr. Lockhart that his social security benefits would be withheld to offset his student loan debt. *Id.* 2 at 9. Mr. Lockhart contacted the Department of Education the following day to request an administrative review of the decision to offset his payments. *Id.* On April 4, 2002, he received official notification from the Department of the Treasury that his benefits would be offset up to 15% each month to pay the

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[1]Citations to "SER" refer to the Supplemental Excerpts of Record filed by Mr. Lockhart in the court of appeals. For each reference, the first number is the document number and the second number is the page number.

delinquent student loan debts. *Id.* 18 at 31. The government began offsetting his benefits in May 1, 2002 and is continuing to do so.

C. Proceedings Below

1. District Court

Mr. Lockhart filed this action *pro se* in the United States District Court for the District of Washington on March 20, 2002, seeking an injunction prohibiting the government from offsetting his social security benefits. The district court had jurisdiction under 28 U.S.C. § 1331. *See* Pet. App. 3a. Although Mr. Lockhart's complaint contained a number of different claims, the second claim presented the issue that is the focus of this petition. It alleged that the United States' "attempt to garnish [his] SSD payments by administrative offset is time barred under 31 U.S.C. Sec. 3716(e)(1), as amended, because more than 10 years have passed since [his] education loans became outstanding." *Id.* 2 at 14. Mr. Lockhart also filed a memorandum on the same day as the complaint, which quoted the DCIA's ten-year statute of limitations provision on its first page, SER 3 at 17, and stated that "The Department of Education (ED) commenced its offset action . . . well over ten years after the time Lockhart's loans became outstanding." SER 3 at 18.

On May 16, 2002, the district court, acting *sua sponte*, ordered Mr. Lockhart to show cause why his complaint should not be dismissed for failure to state a claim and for lack of subject matter jurisdiction. Ten days after Mr. Lockhart responded to the order and attempted to clarify his allegations, the district court summarily dismissed the complaint. Pet. App. 8a. After the district court denied his motion for

reconsideration, he appealed to the Ninth Circuit.[2]

2. Court of Appeals

The Ninth Circuit affirmed. Pet. App. 1a-7a. The panel based its decision on a sweeping interpretation of the government's authority to offset social security benefits under the DCIA, 31 U.S.C. § 3716(c)(3)(A)(i)-(ii). Notwithstanding the DCIA's extensive safeguards restricting the government's use of its offset authority, the court opined that the Act "explicitly removes *any protection under section 407* that Social Security benefits may have had from offset, and thus allows the government to reach Lockhart's benefit[s] in order to collect on his debt." *Id.* at 6a (emphasis added). The court recognized, however, that the 1996 Act had left in place the express ten-year statute of limitations on the government's authority to offset payments. Thus, the court observed, "[a] puzzle has been created by the codifiers." *Id.*

The Ninth Circuit's solution to this statutory interpretation "puzzle" relied on a theory of implicit repeal. "[I]t seems clear," the court explained, "that in 1996, Congress explicitly authorized the offset of Social Security benefits, and that in the Higher Education Act of 1991 [sic], Congress had overridden the 10-year statute of limitations as applied to student loans. That the codifiers failed to note the impact of the 1991 repeal on section 3716(e) does not abrogate the repeal." *Id.* 6a-7a. Accordingly, the court concluded, the Debt Collection Act's ten-year statute of limitations was inapplicable. *Id.* 7a. The Ninth Circuit did not explain how its conclusion could be reconciled with the social security anti-alienation provision's prohibition on implicit repeals of the

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[2]Mr. Lockhart filed his appeal *pro se* and completed a full round of briefing without the benefit of counsel. A second round of briefing was completed after the University of Arizona College of Law's Pro Bono Appellate Project agreed to represent Mr. Lockhart in the court of appeals.

broad protection afforded to social security benefits. *See* 42 U.S.C. 407(b).

Less than two weeks later, the Eighth Circuit reached a contrary result. *See Lee v. Paige*, 376 F.3d 1179 (8th Cir. 2004). Mr. Lockhart filed a petition for rehearing the next day, and the Ninth Circuit denied his petition on November 4, 2004.

REASONS FOR GRANTING THE PETITION

I. The Eighth and Ninth Circuits Are in Direct Conflict Over the Authority of the United States to Withhold Social Security Benefits As a Means of Collecting Old Student Loan Debt.

This case presents a classic intercircuit conflict. The Ninth Circuit's decision in this case, which holds that the government may withhold social security benefits to collect old student loan debt, is directly at odds with the Eighth Circuit's decision in *Lee v. Paige*, 376 F.3d 1179 (8th Cir. 2004). In its petition for rehearing en banc in *Lee*, the government asserted that the two decisions create an "intercircuit conflict" concerning a federal program "of substantial importance." Pet. App. 14a.

A. *Guillermety* (E.D. Mich). The first reported case concerning whether the government may offset social security benefits to collect educational debts outstanding more than ten years was *Guillermety v. Secretary of Education*, 241 F.Supp.2d 727 (E.D. Mich. 2002). There, three elderly social security recipients who relied on monthly benefits to meet their basic needs sued to stop the government from offsetting their benefits to collect old student loans. The court recognized that the case required it to "reconcile an apparent conflict between three statutes." *Id.* at 740. The government argued that express reference to the social security anti-alienation provision, 42

U.S.C. § 407, was not necessary because the 1991 Higher Education Act (HEA) amendment did not limit or modify the anti-alienation provision, but instead merely overrode the ten-year limitations period in the Debt Collection Act (DCA), thereby extending the government's authority to offset social security benefits to collect student loans outstanding for more than ten years. *Id.* at 751. The court disagreed for three key reasons.

First, the court explained, the entire purpose of the 1983 amendment to the anti-alienation provision was to reject the doctrine of repeal by implication. "Requiring 'express reference' to section 407 ensured that Social Security benefits could not be unintentionally limited or modified by past or future legislation." *Id.* at 752. Because section 1091a of the HEA did not refer to section 407, the court explained, "[t]he Government's interpretation" is "precisely the type of unintentional expansion of an express modification which Congress attempted to eliminate when enacting" section 407(b). *Id.*

Second, the court rejected the government's position because the government attributed to Congress a result that Congress could not possibly have anticipated. "[W]hen Congress amended section 1091a in 1991, the government was precluded from administratively offsetting Social Security benefits to collect claims of the United States in all circumstances. Clearly, then, when Congress eliminated all statutes of limitation with respect to student loan collections in 1991, it could not have contemplated or intended that this sweeping legislation would permit the government to offset Social Security benefits in the future." *Id.* at 753.

Third, the court concluded that, based on both the legislative history surrounding the DCIA and the fact that the DCIA left the DCA's ten-year limitations period intact, Congress intended to preserve existing limitations on the

government's offset authority when it extended the offset program to encompass social security in 1996. *Id.* at 757 ("The unbridled ability to offset social security benefits was not intended by Congress.").

The United States appealed the decision in *Guillermety* to the Sixth Circuit, but voluntarily dismissed the appeal after the case became moot. *See Guillermety v. Secretary of Education*, 03-1604 (6th Cir. Sept. 24, 2004) (unpublished order).

B. *Lee* (W.D. Mo. and 8th Cir.). The second reported case raising the question presented was brought by Dee Ella Lee, a 68-year-old woman whose social security benefits were being offset to collect on two defaulted student loans–neither one for more than $2,000–taken out in 1978 to finance her studies at a community college. *Lee v. Paige*, 276 F.Supp.2d 980, 981 (W.D. Mo. 2003). Noting that the Department of Education's arguments were "identical to those made" in *Guillermety*, the district court "adopt[ed] the reasoning of the *Guillermety* court and highlight[ed] a few key points." *Id.* at 983. "[T]he major flaw in Education's arguments," the court observed, "stems from the chronology of the enactment of the statutes involved." 276 F.Supp.2d at 983. "When Congress removed all statute of limitations obstacles in § 1091a, it could not have contemplated that its actions would have any effect on Social Security payments because such payments were not yet subject to offset." *Id.* at 984 (citing *Guillermety*, 241 F.Supp.2d at 753).

The district court offered a concise synthesis of the interplay between the DCIA's statute of limitations and the HEA amendment eliminating statutes of limitations: "Congress declared in [the HEA] that there would be no limitations on when student loans could be collected. This statute controls the *time* for collecting past due amounts," whereas the DCIA's statute of limitations "controls the *sources* of funds to which

Education can look to satisfy its claim. Section 3716 does not limit Education's time in which to collect student loans, rather it limits Education's ability to look to Social Security benefits for repayment." *Id.* at 984 (emphasis added). One reason for this latter limitation, the court explained, is the special protection afforded to social security benefits, as evidenced by the Social Security Act's anti-alienation provision. *Id.* at 984 n.1.

The Eighth Circuit affirmed on the basis of the district court's "well-reasoned" opinion. *See Lee v. Paige*, 376 F.3d 1179 (8th Cir. 2004). The court was particularly persuaded by (a) the district court's observation that in 1991, when the HEA amendment was enacted, Congress could not have anticipated its actions to have any effect on social security benefits, (b) that, in the DCIA, "Congress expressly left the ten-year disabling provision intact," and (c) that, if it had intended to allow the HEA amendment to apply to social security, Congress could have said so explicitly. *Id.* at 1180.

Asserting that the Eighth Circuit's decision created an intercircuit conflict on an issue of exceptional importance, the government filed a petition for rehearing and rehearing en banc, Pet. App. 10a, which was denied on October 29, 2004. Judges Loken, Colloton, and Gruender dissented from the denial of rehearing en banc. *See Lee v. Paige*, 03-3819 (8th Cir. Oct. 29, 2004) (unpublished order).

C. *Lockhart* (9th Cir.). The Ninth Circuit's decision below reached the exact opposite conclusion from the other courts that have considered the question presented. The Ninth Circuit's solution to the "puzzle" presented by this case relied on a theory of implicit repeal that is directly at odds with both *Guillermety* and *Lee*, and with the plain text of the social security anti-alienation provision, 42 U.S.C. § 407(b). *Compare Lockhart*, Pet. App. 6a ("That the codifiers failed to note the impact of the 1991 repeal on section 3716(e) does not

abrogate the repeal."), *with Lee*, 376 F.3d at 1180 ("Had Congress intended to limit the disabling provision to allow the government unlimited offset opportunities for the collection of delinquent student loans . . . it would have done so explicitly. In the absence of Congressional language authorizing application of § 1091a to social security offsets . . . the specific limitations in § 3716(e) prevail.").[3]

II. Given the Importance of the Issue Presented, the Circuit Split is Intolerable.

As the United States recently recognized in its Eighth Circuit rehearing petition in *Lee*, the question presented is "of [e]xceptional [i]mportance"—not only for the government's debt collection activities, but also for many social security recipients, like Mr. Lockhart, who depend on their monthly benefits to meet their basic needs. Pet. App. 20a. If the decision below is allowed to stand, two otherwise identically situated social security recipients may receive different monthly allotments depending upon whether they live in Alaska or Arizona, on the one hand, or Missouri or Minnesota, on the

[3]We have been able to locate only two decisions on the question presented—both unreported—that are arguably consistent with the Ninth Circuit's approach in *Lockhart*. *See Chatmon v. U.S. Department of Education*, 2003 WL 21501919 (N.D. Tex. June 24, 2003) (rejecting, based on § 1091a(a)(2), plaintiff's claim that the government was time-barred by the statute of limitations from offsetting his social security benefits to collect on student loans that had been assigned to the Department of Education in 1992 and 1993); *Roth v. United States*, 2003 WL 21730094 (D. Minn. July 22, 2003) (rejecting, based on § 1091a(a)(2), plaintiff's claim that the government was time-barred under a theory of laches from offsetting her social security benefits to collect on student loans that had been assigned to the Department of Education in 1986). Neither case provides any meaningful analysis of the issue. And in light of *Lee*, *Roth* would be wrongly decided under current Eighth Circuit precedent.

other.

The United States made precisely this point in its rehearing petition. The conflict between the decisions of the Eighth and Ninth Circuits, it noted, "creates a situation in which the legality of social security offsets in the present context will depend on where the debtor lives, which is clearly an unacceptable state of affairs." Pet. App. 21a. Indeed, a conflict that "creates unfairness to litigants in different circuits, as in allowing Federal benefits in one circuit that are denied in other circuits," is the classic example of a conflict that is truly "intolerable."[4]

The United States' rehearing petition focused on the potential burden on the government, explaining that "the taxpayers are owed billions of dollars in defaulted student loans" and that "Social Security offsets are one of the few effective means the government has to collect on that indebtedness, a large portion of which is or soon will be 10 years delinquent." Pet. App. 21a. Of all federal agencies, the Department of Education has the largest total receivables ($108.4 billion), comprising 35 percent of the federal government's total. Two types of debt account for virtually all of this total: Federal Direct Loans ($87.7 billion) and Defaulted Guaranteed Loans ($20.4 billion).[5] Student loan debt also comprises the lion's share of the various non-tax debts

[4]Judicial Conference of the United States, *Report of the Federal Courts Study Committee* 123 (1990); *see generally* Arthur Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U.Pitt. L. Rev. 693 (1995).

[5]U.S. Department of the Treasury, Financial Management Service, *Fiscal Year 2003 Report to the Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies* 3 (2004) (hereinafter "FY 2003 Treasury Report to Congress").

collected through the Treasury Offset Program. Of the $31.6 billion in non-tax debts referred for offset by the end of fiscal year 2003, 54 percent ($17.9 billion) were referred by the Department of Education.[6] Over the past three years, the Department of Education has collected approximately $400 million in delinquent student loan debt per year through the offset program.[7]

On the other side, the conflict is important because of its immediate impact on social security recipients carrying student loan debt. Approximately one of every six Americans, and one of every four American households, receives social security benefits.[8] One third of those recipients depend on social security payments for all or virtually all of their income. *Id.* "Eighteen percent of the entire American public reports having outstanding student loan debt."[9] Many of these debts are covered by the DCIA's statute of limitations: According to the Treasury's latest figures, of the debts owed to the government that have been over 180 days delinquent, 19% have been delinquent for over ten years.[10]

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[6]U.S. Department of the Treasury, Financial Management Service, *Delinquent Debt Collection: Fiscal Year 2003*, *at* www.fms.treas.gov/news/factsheets/delinquent_debtcollection.html.

[7] FY2003 Treasury Report to Congress, *supra*, at 19.

[8]Social Security Administration, *Results at the Social Security Administration: Getting It Done* (2004), *at* http://www.ssa.gov/performance/results/results2004.pdf.

[9]*Student Loans a Major Drag on Consumer Spending*, 12 Consumer Bankruptcy News 4, Oct. 3, 2002.

[10]FY2003 Treasury Report to Congress, *supra* at 4.

Finally, this Court's review is warranted because the issue is a recurring one. Although it has been authorized to do so since 1996, the federal government did not actually begin to offset social security benefits until October 2001.[11] In the three years since then, district courts in Texas, Missouri, Michigan, Minnesota, and Washington have already confronted the question presented and two circuits have reached conflicting decisions. Deferring review at this time will lead only to further chaos and uncertainty—for the federal government, for social security recipients, and for courts across the country.

III. The Ninth Circuit's Decision Is Wrong.

This Court should grant certiorari because the decision below is wrong. The other courts to have considered the issue—none of which the Ninth Circuit cited—have presented several persuasive reasons to reject the Ninth Circuit's reasoning.

First, the Ninth Circuit's decision rests on an unexamined—and erroneous—assumption that the DCIA, which allowed the offset of social security benefits for the first time, "remove[d] *any protection* under section 407 that Social Security benefits may have had from offset." Pet. App. 6a (emphasis added). But, as the other courts that have considered this question have recognized, there is no reason to assume that Congress, by authorizing the offset of benefits, intended to eliminate any protection whatsoever afforded by section 407.

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[11]U.S. Department of the Treasury, Financial Management Service, *Fact Sheet: Benefit Payment Offset Program*, available at http://www.fms.treas.gov/news/factsheets/benefitoffset.html; *see also* General Accounting Office, *Major Management Challenges and Program Risks: Department of the Treasury*, GAO-03-109 at 32 (Jan. 2003).

See Guillermety, 241 F.Supp.2d at 750-57; *Lee*, 276 F.Supp.2d at 984, *aff'd*, 376 F.3d at 1179.

On the contrary, the social security anti-alienation provision imposes a broad bar on the attachment of social security payments that may be modified or limited only by "express reference" to the anti-alienation provision. 42 U.S.C. § 407(b). The DCIA *does* contain such an express reference, but it creates only a narrow exception to the anti-alienation provision that is explicitly confined to claims that have been outstanding for less than ten years and claims for which offset is not prohibited by another statute. 31 U.S.C. § 3716(e). In other words, only offsets that comply with the DCIA—when the statute is read as a coherent whole—are exempt from the social security anti-alienation provision.

Second, the Ninth Circuit incorrectly concluded that the 1991 amendment to the HEA allows the government to ignore the DCIA's ten-year statute of limitations when it offsets social security benefits to collect on student loans. The 1991 HEA amendment, however, does not meet the anti-alienation provision's demanding specificity requirement. Instead, it does the opposite: It *generally* provides that time limitations on collection actions do not apply to collection of debts arising from federal educational assistance. It contains no specific reference to section 407, and it does not mention the Social Security Act or payments under that Act. Thus, the HEA amendment is precisely the type of general provision that Congress determined would not supersede the anti-alienation statute when it mandated that an "express reference to this section" is required to modify that statute.

Third, even leaving aside the social security anti-alienation provision, the Ninth Circuit's decision does not properly synthesize the relevant provisions of the DCIA and the HEA. In effect, the decision below gives effect to one provision of the DCIA—the authorization to offset social

security benefits—while failing to give effect to another provision of the same statute that expressly limits the first provision—the ten-year limitations period on the government's offset authority. The DCIA, however, provides a comprehensive scheme for the collection of debts: It authorizes offset, but only subject to specific limitations and safeguards. The Ninth Circuit's decision does violence to this statutory scheme based on the 1991 HEA amendment, a general statutory provision that Congress could not possibly have intended to apply to the offset of social security benefits.

Fourth, the Ninth Circuit's decision is marred by errors concerning the chronology of the relevant enactments, as well as the significance of that chronology to the question presented. After reciting the language of the social security anti-alienation provision, the Ninth Circuit speculated that the administrative offset of social security benefits allowed by the DCIA may not be covered by the anti-alienation provision at all, a view that the government itself does not embrace. *See* Supp. Br. for Appellees at 11 (stating that the anti-alienation provision "protects Social Security benefits from offset absent an express reference to that law."). As the court of appeals put it, "this amendment did not mention offset by the government. Arguably, offset is included [in § 407(a)] under 'other legal process.' Offset, however, is a form of self-help that may not fall within the term. Congress, having so recently amended the Debt Collection Act to provide for administrative offset, may not have intended to deny this remedy to the government." Pet App. 4a. Although it determined that resolving this issue was unnecessary to decide the case, *id.* at 4a-5a, the court's speculation exposes a serious misunderstanding that infects the decision as a whole. The Ninth Circuit's analysis rested on at least two basic misunderstandings.

First of all, the original social security anti-alienation provision—which contains the term "other legal process"—was

not an "amendment," but an integral part of the original Social Security Act. The provision was enacted in 1935, *forty-seven years before* the Debt Collection Act of 1982. *See* Social Security Act, ch. 531, Title II, § 208, 49 Stat. 625 (1935). The 1983 amendment to the Social Security Act added only the requirement that the prohibition on the interference with social security benefits could not be modified without "express reference" to the anti-alienation provision. Thus, it makes no sense to interpret the meaning of the original anti-alienation provision in light of the later-enacted Debt Collection Act.

Moreover, even in 1983, when the anti-alienation provision was amended, the government lacked authority to offset social security payments—authority that did not exist until 1996—so, to use the Ninth Circuit's terminology, there would have been no "remedy" to "deny" the government. This error is especially significant, because it masks a crucial question, which is not even posed, let alone answered, in the Ninth Circuit's decision: How could the 1991 HEA amendment—which eliminated any limitations periods applicable to the collection of student loan debt—possibly have eliminated statutes of limitation applicable to the offset of social security benefits, given that the offset of such benefits was undisputedly prohibited at the time? The answer, Mr. Lockhart submits, is that it could not.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brian Wolfman
(*Counsel of Record*)
Adina H. Rosenbaum
Public Citizen Litigation Group
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

Counsel for Petitioner[12]

December 2004

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[12]Counsel acknowledge the work of Deepak Gupta, a graduate of Georgetown University Law Center, who took a lead role in preparing this petition.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES LOCKHART, *Plaintiff-Appellant,* v. UNITED STATES OF AMERICA; JOHN ASHCROFT, Attorney General; RODERICK R. PAIGE, as Secretary of the United States Department of Education; PAUL O'NEILL, United States Department of the Treasury, *Defendants-Appellees.*	No. 02-35759 D.C. No. CV-02-00640-JCC OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, Chief Judge, Presiding

Argued and Submitted
November 3, 2003—Seattle, Washington

Filed July 23, 2004

Before: John T. Noonan, Kim McLane Wardlaw, and
Richard A. Paez, Circuit Judges.

Opinion by Judge Noonan

COUNSEL

Willie Jordan-Curtis, Jill Sosin, Christopher Scott Jones, Nicole Bunker-Henderson, Ross W. Henderson, The University of Arizona College of Law Pro Bono Appellate Project, Tucson, Arizona, for the plaintiff-appellant.

Phillip H. Lynch, Assistant United States Attorney, Tacoma, Washington, for the defendants-appellees.

OPINION

NOONAN, Circuit Judge:

James Lockhart appeals the dismissal of his complaint by the district court for lack of subject matter jurisdiction and for failure to state a claim for which relief can be granted. We construe Lockhart's pro se pleading liberally and hold that he has asserted a basis for jurisdiction and a cognizable claim for an injunction to stay the government's offset of his Social Security benefits. On the merits, however, we hold that Lockhart's benefits are not protected, and accordingly affirm the judgment entered against him.

PROCEEDINGS

On March 20, 2002, Lockhart filed a complaint against the United States, the Attorney General and the Secretaries of Education and the Treasury alleging that he had received notice from the United States Department of Education that it intended to offset a portion of his monthly Social Security benefits to secure repayment of his government educational loans. Lockhart asserted that, because "more than 10 year shave passed since [his] education loans became outstanding,"the attempt to collect them by offset was "time barred under 21 U.S.C. § 3716(e)(1)."

This claim was buried in a barrage of other contentions which the district court understandably found confusing and which Lockhart failed to clarify when ordered to show cause why his case should not be dismissed for failure to show abasis for jurisdiction and to state a claim for which relief could be granted. On June 4, 2002, the complaint was dismissed in its entirety, and judgment was entered for the defendants.

Lockhart appeals.

JURISDICTION and STANDARD OF REVIEW

We have jurisdiction over the final judgment of the district court pursuant to 28 U.S.C. § 1291. We review de novo both a dismissal for want of subject matter jurisdiction, *see Kehrv. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1287(9th Cir. 1984) and a dismissal for failure to state a claim. *See Transmission Agency of Northern Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 927-28 (9th Cir. 2002).

ANALYSIS

[1] *Construction of Lockhart's Complaint.* In compliance with precedent, we bend over backwards to pluck a viable claim from Lockhart's wide-ranging complaint. *Haines v.Kerner*, 404 U.S. 519, 520 (1972); *Radcliff v. Landau*, 883F.2d 1481, 1482 (9th Cir. 1989) (per curiam). The contention that the government's offset is barred by statute is such a claim. By implication, the claim also alleges federal question jurisdiction.

The Statutes At Issue. Four statutes must be considered. The Debt Collection Act of 1982 provided for administrative offset as a way of collecting debts of the United States, at the same time stating:

> (e) This section does not apply —
> (1) to a claim under this subchapter that has been outstanding for more than 10 years; or
> (2) when a statute explicitly prohibits using administrative offset to collect the claim or type of claim involved.

Pub. L. No. 97-365, 96 Stat. 1754 (1982) (codified as amended in 31 U.S.C. § 3716(e)).

[2] Social Security benefits once appeared to fall squarely within the Act's exception. § 3716(e)(2). The Social SecurityAct, 42 U.S.C. § 407 was amended in 1983 to read:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> (b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

Id. Notably, this amendment did not mention offset by the government. Arguably, offset is included under "other legal process." Offset, however, is a form of self-help that may not fall within the term. Congress, having so recently amended the Debt Collection Act to provide for administrative offset, may not have intended to deny this remedy to the government. To

decide this case we need not resolve the question.

[3] In 1991, the Higher Education Assistance Act was amended to read as follows:

> (1) It is the purpose of this subsection to ensure that obligations to repay loans and grant overpayments are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced.
>
> (2) Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by —
>
> . . . .
>
> (D) the Secretary, the Attorney General, the administrative head of another Federal agency . . . for the repayment of [a student loan] . . . that has been assigned to the Secretary. . . .

20 U.S.C. §§ 1091a(a)(1)-(2). As of 1991, therefore, the statute of limitations contained in the Debt Collection Act no longer prevented the collection of student loans, and the only restriction the government arguably faced in collecting delinquent student loans was that it could not use administrative offset to reach social security benefits. *See* 42 U.S.C. § 407.

[4] However, in 1996, Congress amended the Debt Collection

Act by adding:

> (c)(3)(A)(i) Notwithstanding any other provision of law (including sections 207 and 1631(d)(1) of the Social Security Act (42 U.S.C. 407 and 1383(d)(1)) . . . all payments due to an individual under the Social Security Act . . . shall be subject to offset under this section.
>
> (ii) An amount of $9,000 which a debtor may receive under Federal benefit programs cited under clause (i) within a 12-month period shall be exempt from offset under this subsection.

31 U.S.C. §§ 3716(c)(3)(A)(i)-(ii). This statute explicitly removes any protection under section 407 that Social Security benefits may have had from offset, and thus allows the government to reach Lockhart's benefit in order to collect on his debt.

This amendment was inserted in the Debt Collection Act without removing the language already quoted about the nonapplicability of "this section" to claims outstanding for more than 10 years or to statutes explicitly prohibiting administrative offset. *See* 31 U.S.C. §§ 3716(e)(1)-(2).

[5] A puzzle has been created by the codifiers. But it seems clear that in 1996, Congress explicitly authorized the offset of Social Security benefits, and that in the Higher Education Act of 1991, Congress had overridden the 10-year statute of limitations as applied to student loans. That the codifiers failed to note the impact of the 1991 repeal on section 3716(e) does not abrogate the repeal. Because the Debt Collection Act's statute of limitation is inapplicable here, the government's offset is not time-barred.

Accordingly, we affirm the judgment entered against Lockhart.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES LOCKHART,

Plaintiff

v.

UNITED STATES OF AMERICA, et al.,

Defendants

CASE NO: C02-640C
ORDER

On May 16, 2002, this Court ordered Plaintiff to show cause in writing by 9:00 a.m. on Friday, May 31, 2002, why this matter should not be dismissed for lack of subject matter jurisdiction and failure to state a claim for which relief can be granted. The Court also stayed consideration of Plaintiff's pending motions. On May 24, 2002, the Court received Plaintiff's "Motion and Memorandum in Support of Show Cause Vacatur of Agency Orders." In that pleading, Plaintiff once again fails to explain his theory of liability under federal law, nor does he provide a valid basis for this Court's subject matter jurisdiction. In addition, the facts outlined in the motion regarding the garnishment of Plaintiff's disability benefits do not seem likely to support liability under any legal theory. For these reasons, this action is DISMISSED in its entirety. The clerk is directed to enter judgment for Defendants.

SO ORDERED this 4th day of June, 2002.

CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Nov 04 2004

JAMES LOCKHART

Plaintiff-Appellant,

v.

UNITED STATES
OF AMERICA, et al.,

Defendants-Appellees.

No. 02-35759

D.C. No.
CV-02-00640-JCC

ORDER

Before NOONAN, WARDLAW, and PAEZ, Circuit Judges.

The petition for rehearing is DENIED.

No. 03-3819

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DEE ELLA LEE
Plaintiff-Appellee,

v.

RODERICK PAIGE, Secretary of the
United States Department of Education,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF MISSOURI

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

PETER D. KEISLER
Assistant Attorney General

TODD P. GRAVES
United States Attorney

BARBARA C. BIDDLE
202-514-2541
LOWELL V. STURGILL JR.
202-514-3427
Attorneys, Appellate Staff
Civil Division, Room 9140
Department of Justice
601 D Street, NW
Washington, DC 20530

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3819

DEE ELLA LEE,
Plaintiff-Appellee,
v.
RODERICK PAIGE, Secretary of the
United States Department of Education,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FROM THE WESTERN DISTRICT OF MISSOURI

PETITION FOR REHEARING AND REHEARING EN BANC

The issue in this case is whether the government may offset Plaintiff Dee Ella Lee's social security benefits to recover on two defaulted student loans. The panel, going into conflict with a recent Ninth Circuit decision, see Lockhart v. United States, 376 F. 3d 1027 (9th Cir. 2004), held that the government may not use its social security offset authority with respect to student loans that have been collectable by the United States for more than 10 years. As we explain below, rehearing en banc is appropriate because of the intercircuit conflict with Lockhart, see Fed. R. App. Pro. 35 (b) (2) (B), because the Lockhart decision is correct, and because the loan recovery program at issue is of substantial importance.

Rehearing would be appropriate because the Lockhart decision was issued just days before the panel issued its ruling in this case. The panel's decision does not discuss Lockhart, and rehearing would allow the panel the opportunity to review the Ninth Circuit's reasoning and to be persuaded that Lockhart

was correctly decided.

1. Facts and Procedural History

In 1978, Ms. Lee took out two Perkins student loans, one for $1400 and the other for $2000. See Lee v. Paige, 276 F. Supp.2d 980, 981 (W.D. Miss. 2003). Ms. Lee defaulted on both loans in 1984. The $1400 loan was assigned to the Department of Education on December 29, 1987, and the $2000 loan was assigned to the Department on September 27, 1989. See ibid.

In October, 2001, after numerous attempts to collect Ms. Lee's defaulted student loans failed, the government began withholding $33 per month from her social security payment. Because of an increase in the amount of her social security payment, the offset increased to $53 per month on February 1, 2002. See Lee, 276 F.Supp.2d at 981.

Ms. Lee filed her complaint in 2001, seeking to prevent the government from making the offsets. See Complaint, pp. 1-2 (JA 7-8). The parties filed cross motions for summary judgment, and the district court granted Ms. Lee's motion. See 276 F. Supp.2d at 985. The court held that 31 U.S.C. 3716(e), a provision of the Debt Collection Act ("DCA"), bars the government from offsetting Ms. Lee's social security benefits because her student loans have been collectable by the United States for more than 10 years.

The government argued that 20 U.S.C. 1091a, a provision of the Higher Education Act ("HEA") that was enacted in 1991, abrogated that statute of limitations as it applies here. Section 1091a makes all statutes of limitations inapplicable to the government's student loan collection efforts. The district court rejected that view, however, because Congress did not expressly state its intention to abrogate the DCA's 10-year statute of limitations in 1996, when it authorized the social security offset at issue. The government appealed to this Court, but the panel affirmed for the reasons

stated in the district court's opinion. See Lee v. Paige, 376 F.3d 1179 (8th Cir. 2004).

2. Argument

As the Ninth Circuit correctly held in Lockhart, the Higher Education Act expressly preempts all statutes of limitations that would otherwise bar the government from collecting on a defaulted student loan, including the statute of limitation at issue here. The panel erred in holding otherwise, and rehearing or rehearing en banc is appropriate to correct this error and to prevent an intercircuit conflict with Lockhart.

a. The Higher Education Act Preempts the 10-year Statute of Limitations in the Debt Collection Act.

1. In 1991, Congress amended the Higher Education Act by providing that "[n]otwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment or other action initiated or taken. . .for the repayment of the amount due from a borrower on a loan made under this subchapter. . .that has been assigned to the Secretary [of Education]. . ." 20 U.S.C. 1091a.

As the above text shows, 20 U.S.C. 1091a constitutes a waiver of "any" statute of limitation that would impair the government's student loan collection efforts, by offset or otherwise, regardless of when the limitation statute is or was enacted. Thus, by it its plain terms, this provision waives the 10-year statute of limitations that the panel held forbids the government from offsetting Ms. Lee's social security benefits,

which is found at 31 U.S.C. 3716 (e).[1]

The panel held that the HEA does not waive the DCA's 10-year statute of limitations because Congress, when it amended the DCA to authorize offset of a debtor's social security benefits to collect on a defaulted student loan, did not expressly mention an intent to abrogate the DCA's 10-year limitations statute in that respect. See Lee v. Paige, 376 F.3d 1179, 1180 (8th Cir. 2004).

As we have explained, however, the DCA's 10-year statute of limitations was rendered inapplicable to government student loan collections five years earlier, when Congress enacted 20 U.S.C. 1091a (the HEA provision described above). As the Ninth Circuit correctly held in Lockhart, "[t]hat the codifiers failed to note the impact of the 1991 repeal on section 3716(e) does not abrogate the repeal." Lockhart, 376 F.3d at 1029. As the Ninth Circuit held in Lockhart, that should be the end of the matter.

2. The panel held that when "'Congress removed all - statutes of limitations obstacles in § 1091a, it could not have contemplated that its actions would have any effect on Social Security payments, because such payments were not yet subject to offset;" See Lee, 376 F.3d at 1180 (citation omitted). Section 1091a's plain text, however, reflects Congress's intent

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[1]31 U.S.C. 3716(e) provides that the government offset authority provided under the Debt Collection Act ("DCA") "does not apply. . . to a claim under this subchapter that has been outstanding for more than 10 years. . . ." 31 U.S.C. 3716 (e). Congress made no change to the limitations provision in section 3716(e) when it amended the DCA in 1996 to authorize offset of a debtor's social security benefits in order to recover on delinquent debts owed to the government. See 31 U.S.C. 3716 (c) (3) (A) (i). Thus were it not for the HEA, the 10-year limitations period stated in 31 U.S.C. 3716(e) would govern this case.

that "all" statutes of limitations must give way to section 1091a's preemptive ban. That expression of Congress's intent is controlling here, since Congress did not expressly state any intent to abrogate section 1091 when it enacted the offset authority at issue.

The panel suggested that Congress explicitly overrode section 1091a when it amended the Debt Collection Act in 1996, by "expressly [leaving] the [DCA's] 10-year disabling provision intact." 376 F.3d at 1180. As the Ninth Circuit held in Lockhart, however, all Congress did in 1996 was amend the DCA to authorize the offset at issue, without making any reference to section 1091a, or to the DCA's 10-year statute of limitations. See 376 F.3d at 1030.

Congress's action in 1996, therefore, was in effect nothing more than inaction on the issue at hand. "Congressional inaction cannot amend a duly enacted statute." Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989) (citations omitted). Accord Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A. 511 U.S. 164, 187 (1994) (noting that "Congressional inaction lacks persuasive significance, for purposes of statutory interpretation, because several equally tenable inferences may be drawn from such inaction, including the inference that. . . existing legislation already incorporated the offered change").

The panel also stated that Congress "did not import § 1091a into the social security context" in 1996, when it authorized the offset at issue, 376 F.3d at 1180. Congress did not need to "import" section 1091a into the social security context in 1996, however, because, as we have explained, it applies to "all" statutes of limitations, whenever enacted.

The panel held that "[h]ad Congress intended to limit the disabling provision to allow the government unlimited offset opportunities for the collection of delinquent student loans, . . . it would have done so explicitly." 376 F.3d at 1180. Again, however, the panel has it backwards. When, in 1991, Congress enacted section 1091a, it explicitly decided to free the

government's student loan collection efforts from any and all statutes of limitations, whenever enacted. It did not need to expressly repeat that intention in 1996, when it provided the offset authority at issue. Congress is presumed to act with knowledge of existing law when it enacts new statutes, see, e.g., Estate of Wood v. Comm'r of Internal Revenue, 909 F.2d 1155, 1160 (8th Cir. 1990), and implied repeals of preexisting statutes are found only when there is a clear statement of congressional intent. See, e.g., Indep. Commun. Banker's ass. of South Dakota, Inc. v. Bd. Of Governors of Federal Reserve, 838 F.2d 969, 974 (8th Cir. 1988). As we have said, there is no such statement of congressional intent here.

The panel also reasoned that "[i]n the absence of Congressional language authorizing application of § 1091a to social security offsets. . . the specific limitations in § 3716(e) prevail." 376 F.3d at 1180 (emphasis added). This statement, by referring to the "specific" limitations in section 3716(e), appears to invoke the canon of statutory construction that a specific statute will control over a more general one.

This canon is not helpful here, however, because the DCA's 10-year statute of limitations (31 U.S.C. 3716 (e)) is not more specific the HEA's waiver of all statutes of limitations (20 U.S.C. 1091a) with respect to student loan collections. Indeed, if anything, 20 U.S.C. 1091a arguably is the more specific statute, since it deals with the discrete topic of student loan collections, whereas section 3716(e) deals with debt collection in general.

Finally, the district court incorrectly suggested that enjoining the offsets at issue is necessary to achieve the purposes of the social security laws, which are "'designed to provide recipients with funds to meet their most basic needs, e.g., food, shelter, medicine.'" 276 F.Supp.2d at 984 n.1

(citation omitted).[2] The Debt Collection Improvement Act provides that any offset of social security benefits may not reduce the amount of those payments below $9000 per twelve-month period. See 31 U.S.C. 3716 (c) (3) (A) (ii).

By making that determination, Congress prescribed the minimum level of social security support that is necessary to meet the basic needs of social security recipients. The courts lack authority to question that judgment.[3]

b. The Issue Presented is of Exceptional Importance.

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[2]The district court was referring to what is known as the anti-alienation provisions of the Social Security Act. Those provisions, which are codified at 42 U.S.C. 407, state that social security benefits are not subject to any legal process, except where a law expressly refers to those provisions. As our briefs below explain, see Brief for Appellant, at 7; Reply Brief at 2, Congress specifically, referred to 42 U.S.C. 407 when, in 1996, it authorized the government to offset a debtor's social security benefits to recover a defaulted student loan. See 31 U.S.C. 3716(c) (3) (A) (i) ("notwithstanding any other provision of law (including. . . 42 U.S.C. 407), all payments due to an individual under. . . the Social Security Act. . . shall be subject to offset under this section") (emphasis added).

[3]Treasury regulations further limit the amount of a social security payment that can be offset. See 31 C.F.R. 285.4. Pursuant to those regulations, offset is limited to the lesser of (i) the amount of the debt, including any interest, penalties and administrative costs; (ii) an amount equal to 15% of the monthly covered benefit payment; or (iii) the amount, if any, by which the monthly covered benefit payment exceeds $750. Ibid. 285.4(e).

As our opening brief points out, the taxpayers are owed billions of dollars in defaulted student loans. See Brief for Appellant at 6 n.2. Social security offsets are one of the few effective means the government has to collect on that indebtedness, a large portion of which is or soon will be 10 years delinquent. Thus, the panel's decision will seriously impair the government's student loan collection efforts. Because of the conflict with the Ninth Circuit's ruling in Lockhart, see above, the panel's decision also creates a situation in which the legality of social security offsets in the present context will depend on where the debtor lives, which is clearly an unacceptable state of affairs.

For all the above reasons, and to prevent an intercircuit conflict with the Ninth Circuit in Lockhart, the government respectfully requests the Court to grant rehearing or rehearing en banc.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

TODD P. GRAVES
United States Attorney

BARBARA C. BIDDLE
202-514-2541
LOWELL V. STURGILL JR.
202-514-3427
Attorneys, Appellate Staff
Civil Division, Room 7241
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

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